

Beyond the Need for Defensive Practice: Combining Creativity and Accountability with the Best Interests of Clients

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Synopsis

This article welcomes pluralistic experiment in respect of counsellor and psychotherapist accountability. It examines some significant negative consequences for public protection resulting from a case taken out by the Health Professions Council against a Registered Arts Therapist that was appealed to the High Court. It then outlines an example of civic accountability, a creative option that promises benefits for therapists, their clients and the public. A scheme of this kind would be compatible with existing regulatory frameworks and, in the longer term and after testing, may even emerge as a resilient alternative to them.

Introduction

The accountability of counsellors and psychotherapists has been a preoccupation of mine in recent years. For more than 18 months I have been following a case which the Health Professions Council (HPC) took up against a Registered Arts Therapist, while for somewhat longer I have worked with colleagues locally on a project pioneering civic accountability.¹ Given my long-standing scepticism about therapy regulation,² the sea change in thinking that led to the Council for Health Regulatory Excellence (CHRE) scheme for the accreditation of voluntary registers is welcome.³ The approach of the CHRE is imaginative. It fits in with the view that, as yet, we know too little to justify instituting a comprehensive framework for counselling and psychotherapy regulation and that what is needed is pluralistic experiment.⁴

The case I examine here lays bare a certain type of upwards accountability. I contrast it with an example of horizontal or civic accountability that taps into the wisdom held informally within local communities. Initiatives like this not only give detailed information about a variety of therapists whose statements are publicly supported by referees, but they also promise to enhance practice. They open up the possibility that

counsellors and psychotherapists can turn the issue of accountability into a win-win situation, working to the advantage of both themselves and their clients.

This is important because a culture of compliance has developed that is corrosive towards critical reflection, something that lies at the heart of good practice. Changes in Higher and Further Education are resulting in good training courses closing, a deterioration in staffing ratios and a consequent dumbing down. For many, the choice seems to lie between passive acceptance and impotent anger. Newly qualified therapists are understandably inclined to keep their heads down and search for their niche in the market. Meanwhile it is taking too long to put right the many mistakes made in introducing the Improving Access to Psychological Therapies (IAPT) initiative, which needlessly axed good GP counselling services and failed to deliver improvements proportionate to the considerable increase in state spending.

HPC Regulation in Practice

The case under consideration here involved an HPC Registered Arts Therapist who was course leader, teacher and manager on a well-respected training that led to registration with the HPC. The complaint concerned her work as an educator. The HPC Panel hearing lasted for nine days and was followed by a two-day appeal to the High Court.⁵ Months later, some aspects of the decision are still awaiting clarification. This case encapsulated an ethical dilemma – how to balance the rights of students seeking professional qualifications against the right of the public to be protected from unsuitable individuals qualifying. At no point in these proceedings, however, was the issue presented in these terms. More certainly deserves to be written about this case than there is space for in this article.

When matters reached the High Court, the judge struck out half of the HPC Panel's findings. The reason he gave was that the evidence of an expert witness was completely disregarded. The judge did not deal in his judgement with what was said by another witness, whose evidence the Panel also discounted. This was because this evidence related entirely to findings that he had already struck out, but in the course of the two-day hearing he had already stated that the reasons given by the Panel for dismissing this second witness's evidence were 'verging on the fatuous'.

It's difficult to overturn a tribunal's findings in the High Court. Few HPC Panel cases are appealed and

fewer still are successful.⁶ Much time was taken up with the HPC's barrister arguing that the judge had limited scope to intervene. The judge appeared to be somewhat irritated by this, but it is always interesting in legal cases as to who is considered to have relevant expertise. A judge clearly knows about the law and the HPC is deemed to have expertise in relation to 'health'. One of the three HPC Panel members in this case was an HPC Registered Arts Therapist. But did that mean she had expertise in psychoanalytic psychotherapy, which was the therapist's background? Or was education and training expertise more relevant? The expert witness whose testimony was completely ignored came from an education and training background. It's perhaps not completely surprising, therefore, that the HPC's Conduct and Competence Panel's findings are so unintelligible.⁷

The process as a whole can be queried in other ways too. The HPC runs an initial investigatory procedure. It receives a complaint, which it takes over and pursues as it sees fit. As well as the Panel Chair and two side members, the HPC pays for prosecuting counsel, a stenographer, premises and administration, together with the equivalents of both the clerk to the court and the legal aid board. It pays the expenses of prosecution witnesses, including travel and overnight hotel expenses if need be. It does not pay any expenses for defence witnesses. When it comes to appeals to the High Court there is no financial pressure on the HPC to settle, since, if it lacks funds, it can increase registrants' fees. They are in no position to object.

A case can be made that the HPC operates like this in order to redress perceived difficulties faced by vulnerable clients. The rhetoric on this score has been considerable. In the open sessions of the HPC's Professional Liaison Group, no less a figure than Professor Peter Fonagy stated without apparent qualification, 'We know that 5 per cent of therapists cause damage'.⁸ He did not substantiate this assertion. The HPC's own data for 2009–10 show that the number of complaints relating to psychologists is under 1 per cent of registrants, while the HPC's Investigating Committee Panel found that there was a case to answer in only 29 per cent of these (psychologists have been regulated for too short a period for enough cases to have reached a Final Hearing).⁹ By comparison, the BACP's conviction rate is less than 2 members in 1000.¹⁰ But this, of course, still begs the question as to whether the fault lies in the investigatory and complaints procedures, or whether less damage is caused than Professor Fonagy believes.

The HPC's Fitness to Practise procedure allows extensive use of hear-say evidence. A significant proportion of this hearing was taken up with allegations based on second- and even third-hand hear-say: the Panel allowed a College Investigating Officer who had no experience in psychodynamic thinking and investigated initially entirely on his own to report what he had heard some students say about what other students thought. None of this could be satisfactorily challenged.

When the case came to appeal, the Judge was critical of the Registrant's barrister for not raising with the Panel an objection each time hear-say was introduced. Presumably the barrister did not do this because, first, he realised this would undermine any residual goodwill he still retained with the Panel and, secondly, he assumed that, on appeal, anything based on the unfair use of hear-say would be thrown out. He argued three times that there was no case to answer – at the outset of the Panel hearing, at the conclusion of the prosecution case and in his summing up.

Another device the HPC used was to give anonymity to the originator of the complaint. This is bizarre, given that all the witnesses were qualified professionals. In the mainstream courts anonymity is rare. Other than in cases involving national security, it is normally reserved only for children and other vulnerable people, such as rape victims. Why was anonymity allowed? Not surprisingly this led to considerable anxiety and distress, causing the defendant to question the fairness of the procedure.

The HPC's overriding purpose is to protect the public. This case was brought because the HPC defines its remit as covering all the services delivered by an HPC registrant. Students on this course were therefore defined as service users¹¹ and so the HPC categorised them alongside those whose vulnerability requires special attention, whereas they were actually mature adults putting themselves forward for a professional qualification which would allow them to exercise power over others. Some of these students thought that they had been unfairly picked on by the defendant and, ultimately, this lay at the root of their grievance. But the defendant, as course leader, was mindful of her responsibility to protect the public against anyone she thought might be unsuitable for qualification. On this course the decision to pass or fail was shared with the external examiners and other members of staff who contributed to the students' profiles, which made it all the more necessary to test students thoroughly whilst teaching them. At no point in the public hearings was the tension between her

conflicting responsibilities spelt out. Instead, all attention focused on whether the allegations drafted by the HPC could be substantiated.

The result was not greater protection, but confusion. Indeed, a strong case can be made that the HPC has managed to put the public at greater risk. This decision poses unenviable dilemmas for all HPC Registered Psychologists and Arts Therapists using experiential training methods or providing group supervision within training. This case involves hundreds of pages of transcript and written evidence, but it seems that when delivering training courses, such Registrants will in future need to be much more wary of how they use experiential training methods and about what they say in group supervision. They will also need to be more careful when questioning the suitability of students for practice. Because the rationale for the Panel's decision shows so little understanding of the context of their work, the difficulties for Registrants will be that much the greater. These implications are serious, and have yet to be widely appreciated.

This case also shows some of the consequences for counsellors and psychotherapists, had they been 'captured' (sic) by the HPC. It raises concerns about the fitness for purpose of the HPC, and calls into question whether the kind of procedure run by the HPC is appropriate for the psychological therapies. In important respects it vindicates the Alliance for Counselling and Psychotherapy in its concerns about HPC regulation.

Local Action and Local Accountability

My involvement in this case was predated by an interest in what counsellors and psychotherapists can do to strengthen themselves and their resilience in the face of seemingly ill-conceived central government initiatives. One source of resistance has been the Independent Practitioners Network (IPN). IPN emerged in the early 1990s when it created a viable structure for horizontal accountability that included ongoing peer scrutiny. IPN is sometimes criticised as simply offering another variant on self-regulation, but what cuts strongly against this view is the degree of transparency it promotes, since individuals' professional reputations are tied one to another within their group, once the individuals involved agree to 'stand by' each other's work. To be a member (and only groups can be members) each group must be publicly linked with two other groups, and this considerably extends the number of people with a vested interest in the integrity of their colleagues'

work.¹² IPN has a good track record in regulating its member groups (i.e. those with two link groups and who have published a statement about the ethical framework against which they are to be held to account), but there is less leverage with groups that, as yet, lack membership status. Efforts at resolving disputes have consequently been less successful with these groups. As its working principles and procedures have stood the test of time, IPN has grown in confidence along with its impact in the therapy world.

Despite this, IPN hasn't expanded greatly and younger practitioners are, by and large, conspicuous by their absence. This may be because there is a limit to the size of organisations in which there is in-depth face-to-face engagement with the kind of material brought to IPN national gatherings, particularly since these meetings are open to all-comers. It may also be that younger practitioners take a different attitude as government policy reduces the quality and availability of training, whilst simultaneously putting up its cost. It's hard grappling with the arcane complications that permeate our field of work, particularly those connected with practice within the NHS – for example, the IAPT initiative, NICE guidelines and the implementation of the 2012 Health and Social Care Act. There is no doubt that active participation within IPN is demanding, and the temptation to steer clear of the intricacies of national policy can be overwhelming.

This was one reason why, as the debate about regulation raged, some of us began to consider other approaches to accountability.¹³ We considered a disputes resolution framework to be essential. Trained people would need to be readily available to help resolve differences and disagreements. Another strand lay in the notion of 'practitioner full disclosure'. This was first proposed in America in the 1970s. Richard Mowbray¹⁴ took up the idea, and it is also referred to in the Maresfield Report.¹⁵ Denis Postle¹⁶ put together a detailed proposal, but when this was piloted in 2009, user feedback challenged the very concept of 'full disclosure'.

Our working group took this on board and shifted emphasis. The key seemed to be that information about therapists should be accurate and reliable, whilst avoiding too much detail, as well as steering clear of 'spin' and the manipulative tricks of marketing. We wanted to encourage therapists to communicate better and build transparent, trusting relationships with the general public. We deliberately chose to set the entry level high, and to ask participating counsellors and

psychotherapists to find three referees who would publicly endorse them. These referees need not be therapists but must have a good knowledge of the professional reputation of anyone they endorse.

We required these referees to sign a declaration that they would be willing to recommend any therapist they were endorsing to someone about whom they cared. We did this because we noticed in conversation with colleagues involved in training that the number of students qualifying is typically significantly greater than the number to whom they are willing to refer someone about whom they care.

It would be simplistic, of course, to accuse colleagues of colluding in passing unsuitable students. Rather, there are intractable difficulties in operating fair final assessment procedures – as, indeed, was evident in the HPC case outlined earlier. This problem is inherent in the gate-keeping role, at least so long as the factors that make for effective therapy remain contested to the extent that they are. It is simpler and more straightforward to operate a system of positive endorsement.

Naturally there is considerable uncertainty as to how initiatives of this kind will work in practice. A balance has to be struck between the different elements so that, for instance, the paid administrator isn't drawn too far into day-to-day operations. Users of the scheme are, as far as possible, encouraged to take any concerns up direct with the therapists listed. It is anticipated that referees, once they have signed their declaration, will rarely be involved, unless the person they endorse starts to behave inappropriately. It is hoped that peer pressure will ensure that therapists will be responsive to feedback and act quickly to address any concerns raised with them. If a dispute does develop, trained facilitators will be rapidly brought in, offering sensitive assistance.

It may be that somewhat different schemes will need to be piloted either in different geographical areas or with a somewhat different mix of practitioners (for instance, some may require all those listed to have a counselling or psychotherapy qualification, whereas others may cast their net wider). Some experimentation will undoubtedly be necessary. The referees, for example, have to be visible enough to be seen to be trustworthy. Our thinking is that a photo should be posted alongside their online endorsement in order to guard against bogus references. We decided a phone number and an email address were necessary, but a postal address was not. Others may consider that these requirements do not strike the right balance. Some may

decide it is too much to ask, as we do, for three referees, but we wanted to allow for temporary unavailability.

The requirements of schemes of this nature must not be too onerous, or counsellors and psychotherapists won't join, but if they are too lax the scheme won't be credible. Initially at least it will be important to cross-check them against the knowledge held within local geographical communities, where to an extent practitioners are known to each other. National schemes will therefore be unlikely until early on. The experience of IPN suggests that it is not possible to figure out in advance satisfactory answers to all potential objections.

If we were simply proposing another online directory, it would be hard to be optimistic about its prospects. However, we are planning something much more than this since the scheme encourages therapists to explore what is helpful to potential clients. Those listed will no doubt monitor each other's entries and seek ways of pinpointing what is distinctive about their own work. It will be possible to challenge spin and exaggeration. Support from the disputes resolution framework will be available, and it's likely that someone somewhere will be in a position to know whenever a therapist makes exaggerated claims. We envisage this as a virtuous circle, encouraging the optimum disclosure of relevant data that is useful to potential clients, whilst at the same time holding therapists to account for what they write.

Although it won't resolve all questions of accountability, this framework is likely to reduce the number of disputes that escalate into formal complaints. Existing complaints systems won't become redundant, as some matters will inevitably need to be dealt with at a national level by, for instance, UKCP or BACP. What is proposed here thus complements and enhances existing accountability systems, although it also holds out the possibility, when fully tested, that it could become a resilient regulatory framework. **S**



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Notes and References

- 1 See <http://www.find-a-therapist.uk.net/>
- 2 For too long, Government policy towards our field has been based on a selective reading of the underpinning research – see Daniel B. Hogan, *The Regulation of Psychotherapists* (4 vols), Ballinger, Cambridge, Mass., 1979; and Bruce E. Wampold, *The Great Psychotherapy Debate: Models, Methods and Findings*, Lawrence Erlbaum, London, 2001. Neither of these important studies have been given the attention in the UK that they deserve. Hogan's research showed 30 years ago that the rationale for HPC regulation was deeply unsatisfactory. Wampold's shows conclusively that the medical model is unsatisfactory as an explanation of the research data in relation to counselling and psychotherapy. NICE Guidelines and IAPT, in short, are based on a misreading of the relevant science.
- 3 Douglas Bilton, 'Setting up an accreditation scheme for voluntary registers', *Self and Society*, 39 (4), 2012: 6–10
- 4 Daniel Hogan, 'Professional regulation as facilitation, not control: implications for an open system of registration versus restrictive licensure', in Yvonne Bates and Richard House (eds), *Ethically Challenged Professions*, PCCS Books, Ross-on-Wye, 2003, pp. 160–71.
- 5 Levinge v Health Professions Council [2012] EWHC 135 (Admin).
- 6 In 2009–10, some 772 cases were received by the HPC, and five cases from HPC Panels were appealed to the High Court. Of the nine cases concluded that year, four were remitted back for reconsideration and only one appeal was upheld.
- 7 <http://www.hpc-uk.org/complaints/hearings/index.asp?id=2085&month=5&year=2011&EventType=H>
- 8 Janet Haney, *Regulation in Action*, Karnac Books, London, 2012, p. 164.
- 9 HPC, *Fitness to Practise Annual Report*, London, 2010.
- 10 Clare Symons, Suky Khele, Jack Rogers, Judith Turner and Sue Wheeler, 'Allegations of serious professional misconduct: an analysis of the British Association for Counselling and Psychotherapy Article 4.6 cases, 1998–2007', *Counselling and Psychotherapy Research*, 11 (4), 2011: 257–65.
- 11 HPC, *Standards of Performance*, Foreword, 2008.
- 12 See <http://i-p-n.org/>
- 13 Working group members were Irene Galant, Kamalamani, Juliet Lamont, Arthur Musgrave, Els van Ooijen and Chris Wilson.
- 14 Richard Mowbray, *The Case Against Psychotherapy Registration: A Conservation Issue for the Human Potential Movement*, Trans Marginal Press, London, 1995.
- 15 The Maresfield Report on the Regulation of Psychotherapy in the UK, London, 2009.
- 16 Denis Postle, 'Practitioner accountability: a practitioner "full disclosure list"', in Yvonne Bates and Richard House (eds), *Ethically Challenged Professions*, PCCS Books, Ross-on-Wye, pp. 172–8.